

8. John A. Carollo, Jr. et al.,⁶
9. Richard M. Carrus and Joelmart, Inc.;
10. Channel 47 Limited Partnership;
11. Stephen M. Cilurzo;
12. Giles Television, Inc.;
13. Fredericksburg Channel 2;
14. Galaxy Communications, Inc.;
15. Henry Geller
16. Lisa M. Harris;
17. Heidelberg-Stone Broadcasting Co.;
18. Highlands Broadcasting Co., Inc.;
19. Homewood Partners, Inc.
20. Irene Rodriguez Diaz de McComas;
21. J & M Broadcasting Co., Inc.;
22. JEM Broadcasting Co., Inc.,
23. KERM, Inc.;
24. The League of United Latin American Citizens (LULAC);
25. Lowrey Communications, Limited Partnership;
26. Barbara D. Marmet;
27. Miller Communications, Inc.;
28. J. McCarthy Miller;
29. Minority Media and Telecommunications Council, et al.,⁷
30. Miracle Radio, Inc.;
31. National Association of Broadcasters (NAB);
32. National Broadcasting Company, Inc. (NBC);
33. Paloma Broadcasting Company, Inc.;
34. Pears Broadcasting, Inc.;
35. Prairie Broadcasting, Inc.;
36. Rio Grande Broadcasting, Inc.;
37. ROJO, Inc.;
38. SBH Properties, Inc.;
39. Scripps Howard Broadcasting Company;
40. Skyland Broadcasting Company;
41. Elinor Lewis Stephens ;
42. Robert M. Stevens;

⁶ John A. Carollo, Jr., Friendship Communications, Ltd., JAM FM Limited Partnership, Chanel Broaading, Palm Tree FM Limited Partnership, Craig L. Siebert, WEDA, Ltd., Columbia FM Limited Partnership, and O'Day Broadcasting, Ltd.

⁷Minority Media and Telecommunications Council, the National Association for the Advancement of Colored People, the League of United Latin American Citizens, and the National Bar Association

43. Sun over Jupiter Broadcasting, Inc.;
44. TAK Communications, Inc.;
45. Trans-Columbia Communications ;
46. Carl Como Tuter;
47. United Broadcast Group, Ltd.;
48. Gary E. Willson;
49. Martha-Mary Willson;
50. Nancy A. Willson;
51. Werner Wortsman.

The following reply comments were filed in response to the SFNPRM in GC Docket No. 92-52:

1. American Women in Radio and Television, Inc.;
2. August Communications Group, Inc.;
3. Black Citizens for a Fair Media, et al.;
4. John W. Barger;
5. Breeze Broadcasting Company, Inc.;
6. John A. Carollo, et al.;
7. Fredericksburg Channel 2;
8. Irene Rodriguez Dias de McComas;
9. Jerome Thomas Lamprecht;
10. League of United Latin American Citizens;
11. Marantha Broadcasting Company, Inc.;
12. Barbara D. Marmet;
13. Miracle Radio, Inc.;
14. Mogol Media Broadcasting, Inc.;
15. Shockley Communications Corporation;
16. United Broadcasters Company;
17. The WB Television Network;
18. Paul D. Peterson, president Wylde Broadcasting.

II. GEN Docket No. 90-264

The following comments were filed in GEN Docket No. 90-264:

1. American Women in Radio and Television, Inc.;
2. August Communications Group, Inc. and John W. Barger;
3. Black Citizens for a Fair Media et al.;⁸

⁸ Black Citizens for a Fair Media, Center for Media Education, National Association for Better Broadcasting, Philadelphia Lesbian and Gay Task Force, Telecommunications Research

4. Susan M. Bechtel;
5. du Treil, Lundin & Rackley, Inc.;
6. The Federal Communications Bar Association (FCBA);
7. The National Association of Broadcasters (NAB);
8. National Public Radio and America's Public Television Stations (NPR/APTS);
9. New Miami Latino Broadcasting Corporation;
10. New Paltz Broadcasting, Inc.;
11. Reed Smith Shaw & McClay;
12. Rex Broadcasting Corporation;
13. Todd Robinson;
14. Marc C. Scott Communications, Inc.
15. Tucker Broadcasting Corporation, Limited Partnership;
16. United States Catholic Conference (USCC);

The following reply comments were filed in GEN Docket No. 90-264:

1. Susan M. Bechtel;
2. Black Citizens for a Fair Media et al.;
3. Evergreen Communications Company;
4. Greater Greenwood Broadcasting Limited Partnership;
5. The National Association of Broadcasters;
6. Reed Smith Shaw & McClay;
7. Rex Broadcasting Corporation;
8. Kin Shaw Wong and Hispanic Broadcasting, Inc.

and Action Center, DC Chapter of the National Association of Puerto Rican Women, and the Office of Communication of the United Church of Christ.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and procedures proposed in this Notice of Proposed Rulemaking. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided above in Paragraph 110. The Secretary shall send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register. See id.

I. Need for and Objectives of the Proposed Rules: This rulemaking is initiated to implement the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which amended section 309(j) and adopted new section 309(l) of the Communications Act. Comments are sought on: (1) proposed auction procedures to award initial licenses in the broadcast services and secondary broadcast services; (2) whether the Commission should use auctions or comparative hearings to resolve pending comparative initial licensing proceedings involving competing applications for commercial radio and television stations filed before July 1, 1997, as authorized by new section 309(l); (3) whether amended section 309(j) requires the use of auctions to award initial licenses for Instructional Television Fixed Services; and (4) how to resolve pending comparative renewal proceedings, which cannot be resolved by auction pursuant to amended section 309(j).

II. Legal Basis: This NPRM is authorized under the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, Title III, Section 3002, and Sections 4(i), 4(j), 303(r), 309(g), 309(i), 309(j), 309(l), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309(g), 309(i), 309(j) 309(l), and 403.

III. Description and Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply: Under the RFA, small entities include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. § 601(6). The RFA, 5 U.S.C. § 601(3), defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA"). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of

¹See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Act of 1996 (SBREFA).

Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."²

The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.³ A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.⁴ Included in this industry are commercial, religious, educational, and other radio stations.⁵ Radio broadcasting stations which primarily are engaged in radio broadcasting and which produce radio program materials are similarly included.⁶ The 1992 Census indicates that 96 percent of radio station establishments (5,861 of 6,127) produced less than \$5 million in revenue in 1992.⁷ Official Commission records indicate that 11,334 individual radio stations were operating in 1992.⁸ As of September 30, 1997, official Commission records indicate that 12,227 radio stations and 2836 FM translator/booster stations were licensed.⁹

Additionally, the Small Business Administration defines a television broadcasting

² We tentatively believe that the SBA's definition of "small business" greatly overstates the number of radio and television broadcast stations that are small businesses and is not particularly suitable for our purposes, and we specifically seek comment on how we should define small business for this purpose. However, for purposes of this NPRM we are utilizing the SBA's definition in determining the number of small businesses to which any auction procedures or revised comparative criteria would apply. In this regard, we reserve the right to adopt a more suitable definition of "small business" as applied to radio and television broadcast stations. See Fifth Report and Order in MM Docket No. 87-268 (Advanced Television Systems and their Impact upon the Existing Television Broadcast Service), FCC 97-116 at 62 (April 27, 1997); Report and Order in MM Docket No. 93-48 (Children's Educational and Informational Programming), 61 Fed. Reg. 43981, 43992 (August 27, 1996), citing 5 U.S.C. § 601(3). See also Order and Notice of Proposed Rulemaking in MM Docket No. 96-16 (Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines), 11 FCC Rcd 5154 (1996), requesting comment as to whether relief should be afforded to the stations: (1) based on staff size and what size should be considered sufficient for relief (e.g., 10 or fewer full-time employees); (2) based on operation in a small market; or (3) based on operation in a market with a small minority work force.

³ 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4832 (1996).

⁴ Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 78, Appendix A-9.

⁵*Id.*

⁶*Id.*

⁷ The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

⁸ FCC News Release No. 31327, Jan. 13, 1993.

⁹ FCC News Release No. 80286, Nov. 6, 1997.

station that is independently owned and operated, is not dominant in its field of operation, and has no more than \$10.5 million in annual receipts as a small business.¹⁰ Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.¹¹ Included in this industry are commercial, religious, educational, and other television stations.¹² Also included are establishments primarily engaged in television broadcasting and which produce taped television program materials.¹³ There were 1,509 television stations operating in the nation in 1992.¹⁴ That number has remained fairly constant, as indicated by the approximately 1,563 full power television stations, 2027 low power television stations, and 4994 television translator stations licensed as of September 30, 1997.¹⁵ In 1992,¹⁶ there were 1,155 television station establishments that produced less than \$10.0 million in revenue.¹⁷

In addition, there are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity. ITFS is a non-pay, non-commercial educational microwave service that, depending on SBA categorization, has, as small entities, entities generating either \$10.5 million or less, or \$11.0 million or less, in annual receipts. However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we tentatively conclude that up to 1932 of these licensees are small entities. We seek comment on this conclusion.

In the event the Commission decides, for equitable considerations or other reasons, to hold comparative hearings to resolve certain mutually exclusive pending applications for new

¹⁰ 13 C.F.R. § 121.201, SIC 4833.

¹¹ Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

¹² Id.

¹³ Id.

¹⁴ FCC News Release No. 31327, Jan. 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, *supra* note 71, Appendix A-9.

¹⁵ FCC News Release 80286, Nov. 6, 1997.

¹⁶ Census for communications establishments are performed every five years, during years that end with a "2" or "7". See Economics and Statistics Administration, Bureau of Census, U.S. Dep't of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9, III (1995).

¹⁷ The amount of \$10 million was used to estimate the number of small business establishments because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

commercial radio and television stations filed before July 1, 1997 or for a subset of such pending cases, any new comparative criteria developed in this proceeding will apply to these pending pre-July 1, 1997 applications. We estimate that there are approximately 1475 pending applicants for a new commercial radio or full power television station filed before July 1, 1997 that might be decided by comparative hearing rather than by auctions.

Any auction procedures developed in this proceeding for all licenses to provide commercial broadcast service or secondary broadcast service that are presently subject to auction will affect: (1) any entity with a pending application for a construction permit for a new commercial radio or full power television broadcast station, if all mutually exclusive applications were filed after June 30, 1997; (2) any entity with a pending application for a construction permit for a new commercial radio or full power television station filed before July 1, 1997, if mutually exclusive applications were filed and none of the competing applications is a renewal application and if the Commission decides that such initial license applications should be subject to auction; (3) any entity that files an application in the future for a new commercial radio or full power analog television station if mutually exclusive applications are accepted; (4) any entity having a pending application on file, or filing an application in the future, for a new low power television station, or a television or FM translator station, if mutually exclusive applications are accepted; (5) any entity that has a pending or future application to make a major change in an existing facility in any commercial broadcast or secondary broadcast service, if mutually exclusive applications are accepted and if the Commission decides to auction such major change applications; and (6) any entity that has a pending or future ITFS application, if mutually exclusive applications are accepted and if the Commission decides that it must, or should, auction mutually exclusive ITFS applications.

If auction procedures are adopted in this proceeding, all entities that file applications for construction permits to provide commercial broadcast service before the effective date of any such auction procedures must submit a completed short-form application (FCC Form 175) and any engineering information necessary to determine mutual exclusivity, if resolution of their applications is subject to competitive bidding procedures. This requirement would also apply to entities that file applications for construction permits to make major changes in existing commercial broadcast stations during this period if the Commission ultimately decides to resolve mutual exclusivity among competing major change applications by competitive bidding. In the event that an applicant is the winning bidder, it must submit a long-form application that would then be reviewed by the agency. We estimate that, as of October 31, 1997 there are approximately 1475 pending applicants for a new commercial radio or full power television station filed before July 1, 1997; approximately 315 pending applications for new radio and full power television stations filed after June 30, 1997 that are mutually exclusive with permit applications filed after that date; approximately 100 pending applications for new low power television stations/television translator stations; and approximately 24 pending applications for translator stations. All of these pending mutually exclusive applications will be subject to any auction procedures for analog broadcast service adopted in this proceeding.

Applicants for construction permits are required to demonstrate sufficient financing to construct and initially operate the proposed station. However, we do not require the filing of financial information concerning the entity seeking a construction permit. Thus, except for those applicants already owning a broadcast station that seek a permit to construct additional stations, we have no data on file as to whether entities with pending permit applications, which are subject to the new auction rules for analog broadcast service, meet the Small Business Administration's definition of small business concern. We assume for the purposes of this IRFA that most of the entities formed for the purpose of applying for a permit to construct a new radio broadcast station or a television station are small entities, as defined by the SBA rules.

In addition to the pending applicants that may be affected by the proposed auction procedures for analog broadcast service, any entity that applies for a construction permit for a new radio or television station in the future will be subject to the proposed auction procedures if mutually exclusive applications are filed. The number of entities that in the future may seek a construction permit for a new analog broadcast station is unknown. We anticipate, however, that due to the passage of the Telecommunications Act of 1996 and corresponding changes in our multiple ownership and attribution rules, the characteristics of future broadcast applicants may be somewhat different from those of pending applicants. We invite comment as to the number and characteristics of future applicants for new commercial analog broadcast stations, and for commercial facilities in the various secondary broadcast services.

The new auction procedures would not apply to entities that filed applications for construction permits after June 30, 1997 for new commercial radio and full power television stations that are mutually exclusive with two or more pending initial license applications filed before July 1, 1997. We estimate that as of October 31, 1997, there were approximately 7 such applications (5 radio and 2 TV) that will be ineligible to participate in an auction to choose among mutually exclusive pre-July 1 applications for new commercial broadcast stations.

In addition, any competitive bidding procedures developed for analog broadcast service will not apply to the few pending comparative renewal cases. Resolution of these cases will depend on any comparative criteria, two-step renewal process or other basis adopted in this proceeding for deciding these comparative renewal cases. This will affect broadcast station licensees that filed their applications for renewal of license on or before May 1, 1995 and any pending initial license applications that are mutually exclusive with such renewal applications. We estimate that there are approximately 9 initial license applications that are mutually exclusive with 8 pending renewal applications. This includes approximately 15 television applicants and 2 radio applicants.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance

Requirements: Comment is sought on what filing and compliance requirements should be associated with any competitive bidding procedures consistent with the Commission's statutory obligations to require such transfer disclosures and other measures

necessary to prevent unjust enrichment and the court's concerns in Bechtel regarding reliance on purely ephemeral licensing considerations. The NPRM tentatively proposes that, if bidding credits or other special provisions are adopted for any designated entities and/or non-group owners, licensees benefitting from such special provisions must annually certify for five years their continuing eligibility for such bidding credit or special provision under the rules in effect at the time the license was awarded, and report any changes in such eligibility within 30 days. In addition, applications for construction permits, short-form auction applications, and other submissions will be required of those falling within any proposed competitive bidding procedures, as described in Section III of this analysis.

V. Significant Alternatives To Proposed Rule Which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives: This NPRM contains no significant alternatives because amended section 309(j) requires that the Commission use competitive bidding procedures to award virtually all licenses, including construction permits for new commercial broadcast facilities, and this requirement applies to most pending broadcast applications, except for comparative licensing cases that involve applications for new full service radio and television stations filed before July 1, 1997. See ¶¶ 39-82. As to that narrow category of applications, see ¶¶ 23-28, in which the Commission has the authority to resolve mutually exclusivity by comparative hearings rather than by competitive bidding procedures, the Commission's discretion is nevertheless constrained by the court's decision in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), and the potential difficulty of devising judicially sustainable comparative criteria. Although the NPRM tentatively concludes that, from a public interest standpoint competitive bidding procedures are preferable in these cases, see ¶¶ 13-20, it asks for comment on whether there are equitable reasons to decide these cases, or a subset of these cases, by comparative hearings. Moreover, we believe that the proposed competitive bidding procedures for all future, and, potentially, all pending, applications for construction permits to provide commercial broadcast service that are presently auctionable under the statute will have a minimal impact on small entities who apply for and obtain broadcast licenses. Also, to minimize any possible impact on small businesses, the NPRM asks for comment on whether bidding credits or other special provisions are warranted for small businesses, including those owned by members of a minority group or women and for rural telephone companies. The NPRM further concludes that, to the extent that it is permissible under applicable constitutional standards, the Commission should take steps to further its longstanding goal of increasing minority ownership of broadcast stations and implementing the designated entity provisions of section 309(j)(4) of the Act.

VI. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule: None.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL POWELL**

Re: Implementation of Section 309(j) of the Communications Act -- Competitive Bidding Procedures for Commercial and Instructional Fixed Television Service Licenses (MM Docket No. 97-234), Reexamination of the Policy Statement on Comparative Broadcast Hearings (GC Docket No. 92-52) and Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (Gen Docket No. 90-264).

I fully support this Notice of Proposed Rulemaking. The auction rules for commercial radio and television licenses that we propose today are consistent with the intent of Congress as expressed in the Balanced Budget Act of 1997. Moreover, auctions for these licenses will serve the public interest because we will be able to award licenses efficiently, thereby quickly getting to consumers those services that they most value.

This Notice also seeks comment on ways to implement the further will of Congress, expressed in Section 309(j)(4)(d) of the Communications Act, that we give small businesses, rural telephone companies, and businesses owned by members of minority groups and women the opportunity to participate in the provision of spectrum-based services. Fulfilling this statutory mandate has become more and more challenging. In recent years, our policies designed to improve opportunities for minorities and women have come under rigorous judicial scrutiny. The courts have made clear that to sustain race-based policies, they must be narrowly tailored to advance a compelling government interest.

In my view, we are right to be concerned when we observe trends that suggest minorities and women are not enjoying the fruits of new economic opportunity, and should endeavor mightily to determine the reasons why and to put into place sustainable solutions. This task has always been difficult, but is particularly arduous now in light of recent rulings by the courts. It is worthy to do, nonetheless, and I urge the commentators to offer well-reasoned, comprehensive and creative comments to aid the Commission in its effort. I believe it is unhelpful to offer self-evident rationales, as has sometimes been done in the past, or to re-argue the worthiness of our concern. If one believes, as I do, that the Constitution is not a complete bar to expanding opportunities for minorities and women, then we should not be afraid to forge ahead in search of effective tools to use that will pass judicial review--no matter how difficult it might be to navigate a successful path.

Separate Statement of Commissioner Gloria Tristani

Re: In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Television Service Licenses (MM Docket No. 97-234), Reexamination of the Policy Statement on Comparative Broadcast Hearings (GC Docket No. 92-52), and Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (GEN Docket No. 90-264).

I support today's action to implement the Balanced Budget Act of 1997 by proposing rules for auctions to resolve initial broadcast license proceedings involving mutually exclusive applications filed after June 30, 1997. I believe that the auction rules proposed in the Notice faithfully reflect the Balanced Budget Act's amendments to Section 309 of the Communications Act and will ensure an expeditious resolution of mutually exclusive application proceedings.

At the same time, however, I believe it is important for the Commission to promulgate rules that meet all of its obligations under Section 309. In particular, Section 309(j)(4)(D), which was unaffected by the Balanced Budget Act, directs the Commission to promulgate auction rules that ensure that small businesses, rural telephone companies and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services. This provision is in keeping with Congress' and the Commission's longstanding commitment to promoting minority ownership of mass media outlets. I too am firmly committed to advancing that goal because, among other reasons, I believe that diversity of ownership is one of the best ways to ensure that all points of view are heard in the vital public debates that take place over our public airwaves. In this regard, I am deeply concerned that minority ownership of broadcast stations has declined from 3.07 percent in 1995 to 2.81 percent in 1996-97. I will be especially interested in reviewing proposals designed to reverse this trend, as well as proposals designed to meet the Commission's specific obligations under Section 309(j)(4)(D), in a fair, workable and judicially sustainable manner.

The Notice also proposes rules for resolving the hundreds of pending comparative licensing proceedings that have been stayed by the Commission in the wake of the Bechtel II decision. I believe that the Commission should make every effort to resolve these cases -- many of which have been pending for several years -- as quickly as possible. That is why I am prepared to join in the tentative conclusion that auctions may be the best way to resolve this limited set of cases. I wish to stress, however, that I am open to proposals to use comparative criteria for some or all of these pending cases. Although comparative hearings may not dispose of such cases as quickly as auctions, I believe that certain equities or other public interest considerations may be involved that would make it inappropriate to subject them to competitive bidding.